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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
PORTLAND DIVISION

**ROCKY BIXBY, et al,**

Plaintiffs,

vs.

**KBR INC., et al.,**

Defendants.

No. 3:09-cv-632-PK

DEFENDANTS' REPLY TO PLAINTIFFS'  
MEMORANDUM IN OPPOSITION TO  
DEFENDANTS' MOTION FOR POST-TRIAL  
JUROR INTERVIEWS

**I. INTRODUCTION**

On November 5, just three days after returning a verdict, *The Oregonian* reporter Mike Francis published interviews of two jurors who volunteered to speak to the press. Francis reported that one of those jurors claimed that "KBR Inc. knew a hazardous chemical was present at an Iraqi water treatment plant even before arriving there." The Francis article then reports another juror, Jim Zarr, declared "He and other jurors saw that KBR had referenced [the MSDS for sodium dichromate] as early as November 2002...."

As this court is well aware, at no time during trial did plaintiffs present any evidence that KBR knew of the presence of sodium dichromate—or any other hazardous contaminant—before arriving at Qarmat Ali. Nor was there any evidence KBR referenced an MSDS for sodium dichromate before arriving at Qarmat Ali, or referenced an MSDS for sodium dichromate in November 2002. This absence of evidence raises the question: what is the source of information upon which these jurors relied in reaching their false conclusions?

Reports that at least one juror wrongly concluded that KBR knew a hazardous chemical was present before arriving at Qarmat Ali, and that multiple jurors claimed they “saw that KBR had referenced” an MSDS for sodium dichromate in November 2002 when in fact there was no such evidence presented at trial, are both clear indications this jury was exposed to extraneous information or ex parte contacts. These circumstances are evidence of juror misconduct that may warrant a new trial. This Court should allow KBR to conduct voluntary interviews of the members of the jury to determine whether an evidentiary hearing is necessary.

## II. EVIDENCE OF JUROR MISCONDUCT

Mike Francis’ November 5, 2012 article in *The Oregonian*<sup>1</sup> states in relevant part:

KBR Inc. knew a hazardous chemical was present at an Iraqi water treatment plant even before arriving there, said one of the jurors who on Friday awarded \$85 million in damages to 12 Oregon soldiers. But the defense contractor allowed soldiers and employees to work there for months before dealing with the contamination, he said.

“It is such a strong case of negligence,” said Jim Zarr, a City of Portland building inspector. KBR officials knew about it, but said nothing to the soldiers who were protecting them at the Qarmat Ali water treatment plant, he said. “All they had to do was talk to them.”

Zarr, one of two jurors to speak with *The Oregonian* after the verdict, said he found the Material Safety Data Sheet for sodium dichromate to be the single most significant document in the trial.

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<sup>1</sup>The article is attached as Exhibit 1 to this motion and as Appendix B to plaintiffs’ Memorandum in Opposition, Dkt. 617.

**He and the other jurors saw that KBR had referenced it as early as November 2002** - four months before the contractors first reached Qarmat Ali, soon after the U.S. - led invasion of Iraq. But work at the plant wasn't shut down until late in the summer, after the Oregon soldiers and many other troops and contractors had spent time at the site.” [emphasis added]

In fact, this jury received no evidence that KBR knew about the presence of any hazardous chemical at Qarmat Ali before arriving on scene. This jury heard no evidence that KBR knew about the presence of sodium dichromate before visiting the plant, or referenced the MSDS in November 2002. That the jurors’ quotes are so factually specific and yet completely unsupported by the evidentiary record is a strong indication this jury was exposed to information outside of the evidentiary record.

One possible source of misinformation during trial could be improper juror internet research. A simple Google search of the terms “KBR; sodium dichromate; 2002” returned links to many media sources reporting not just on this case, but reporting specifically on the plaintiffs’ April 4, 2012 Motion to Compel. (Google search results are attached as Ex. 2). As this court recalls, plaintiffs’ Motion to Compel contained many falsehoods, including the plaintiffs’ disproven accusation that the Contingency Support Plan, begun in November 2002, “indicates that 4020 tons of sodium dichromate per was being used by the Iraqis at Qarmat Ali.” Page 9, Memorandum in Support of Motion to Compel, Dkt. 288.

Plaintiffs might attempt to argue the jurors’ factual errors should be overlooked if those errors related only to a collateral issue. But in this trial, what KBR knew and when KBR knew it were factual determinations central to plaintiffs’ presentation about liability. The probability that this jury was exposed to critical but erroneous extraneous evidence that plaintiffs’ counsel strategically and prejudicially put and published in the public domain justifies KBR’s request to interview the jurors.

### III. THIS COURT HAS AUTHORITY TO AUTHORIZE JUROR INTERVIEWS

In the face of specific evidence of juror misconduct, this court can and should grant defendants' request for voluntary juror interviews. Local Rule 48-2 affirms this court's authority to permit parties or their attorney to initiate contact with jurors concerning any case which that juror was sworn to try. LR 48-2 provides:

"Except as authorized by the Court, attorneys, parties, witnesses, or court employees must not initiate contact with any juror concerning any case which that juror was sworn to try."

LR 48-2 is entirely consistent with Federal Rules of Evidence 606. FRE 606(b) circumscribes the inquiry into the validity of a verdict, but specifically allows a juror to testify about whether extraneous prejudicial information was improperly brought to the jury's attention or an outside influence was improperly brought to bear on any juror.<sup>2</sup>

Similarly, court-approved voluntary juror interviews are wholly consistent with the Oregon Rules of Professional Conduct 3.5(c), which provides:

A lawyer shall not:

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(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

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<sup>2</sup> FRE 606(b) provides:

(b) During an Inquiry into the Validity of a Verdict or Indictment.

- (1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.
- (2) Exceptions. A juror may testify about whether:
  - (A) extraneous prejudicial information was improperly brought to the jury's attention;
  - (B) an outside influence was improperly brought to bear on any juror; or
  - (C) a mistake was made in entering the verdict on the verdict form.



- (2) the juror has made known to the lawyer a desire not to communicate; or
- (3) the communication involves misrepresentation, coercion, duress or harassment;

Because the interviews requested by defendants are both court-approved and voluntary, such interviews do not implicate RPC 3.5(c).

In the event the proposed interviews develop additional evidence that extraneous prejudicial information was improperly brought to the jury's attention, or that an outside influence was improperly brought to bear on any juror, defendants would then be entitled to an evidentiary hearing at which jurors would testify regarding those external influences. *See, e.g., Remmer v. United States*, 347 U.S. 227, 230, 74 S.Ct. 450, 98 L.Ed. 654 (1954) (vacating the District Court's judgment and directing a hearing to determine whether the incident complained of was harmful to the petitioner); *United States v. Vasquez*, 597 F.2d 192, 194 (9th Cir. 1979) (trial judge correctly held an evidentiary hearing with the jurors and other interested parties to ascertain if the precise quality of the jury breach.) At present, defendants propose only that they be allowed to conduct voluntary juror interviews to confirm or refute evidence of improper outside influence. Thereafter the court can establish a briefing schedule wherein defendants can show cause why an evidentiary hearing is appropriate. Alternatively, this court has the discretion to immediately schedule an evidentiary hearing in which the court will oversee the interaction with the jurors with both parties present. Regardless of the method of inquiry, juror interviews must take place very soon, before memories fade.

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**IV. CONCLUSION**

Defendants have made more than a threshold showing of improper outside influence and of juror misconduct. Defendants believe that their request for voluntary interviews strikes a fair balance between the jurors' right to privacy and the defendants' right to a fair trial.

Dated this 16th day of November, 2012

Respectfully submitted,

SCHWABE, WILLIAMSON & WYATT, P.C.

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## Jurors say it didn't take long to determine KBR was negligent

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By **Mike Francis, The Oregonian**



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Ed Blacke

A former KBR employee named Ed Blacke, whom the soldiers' lawyers call a "whistleblower" and whom KBR's lawyers described as a disgruntled and contentious, got in touch Monday and provided this photo. He says it shows the aftermath of an incident at Qarmat Ali in which an Indiana Guard soldier was injured when Iraqis protesting their inability to work at the plant hit him with a piece of thrown curbstone.

**KBR Inc.** knew a hazardous chemical was present at an Iraqi water treatment plant even before arriving there, said one of the jurors who on Friday awarded \$85 million in damages to 12 Oregon soldiers. But the defense contractor allowed soldiers and employees to work there for months before dealing with the contamination, he said.

"It is such a strong case of negligence," said Jim Zarr, a City of Portland building inspector. KBR officials knew about it, but said nothing to the soldiers who were protecting them at the **Qarmat Ali water treatment plant**, he said. "All they had to do was talk to them."

Zarr, one of two jurors to speak with The Oregonian after the verdict, said he found the Material Safety Data Sheet for sodium dichromate to be the single most significant document in the trial. He and the other jurors saw that KBR had

referenced it as early as November 2002 -- four months before the contractors first reached Qarmat Ali, soon after the U.S.-led invasion of Iraq. But work at the plant wasn't shut down until late in the summer, after the Oregon soldiers and many other troops and contractors had spent time at the site.

The MSDS is a standardized information sheet for materials in use at construction sites and other projects. **The one for sodium dichromate** starts like this:

*"Very hazardous in case of skin contact (irritant, sensitizer), of eye contact (irritant), of ingestion. Hazardous in case of skin contact (corrosive, permeator), of eye contact (corrosive), of inhalation (lung irritant). Prolonged exposure may result in skin burns and ulcerations. Over-exposure by inhalation may cause respiratory irritation. Severe over-exposure can result in death."*

KBR, said Zarr, shouldn't have "let these guys wallow in it for three months."

The jurors who spoke about their deliberations said KBR wasn't the only party at fault.



"Is the Army negligent?" asked Zarr. "Yes they are, 100 percent. But you can't sue the Army," he said, alluding to a long-standing legal doctrine holds that troops can't sue the military for harm they suffer while serving.

The soldiers who won their landmark verdict against the defense contractor were still grappling with the knowledge Monday.

"I don't think it's sunk in quite yet," said Larry Roberta from his home in Aumsville. Roberta was a compelling figure at the trial, moving to the witness stand in his wheelchair, carrying his oxygen tank in an Army backpack. On the stand, he told the story of how he had eaten a chicken patty that had been dusted by the orange crystals blown up by the wind while he was at Qarmat Ali. The effect was like ingesting flaming gasoline, he told the jury.

Roberta stressed that money isn't the point of the long legal fight.

"Even if I get any of this money, it's blood money stolen from the U.S. taxpayers," he said. He said his satisfaction will come when the widows of two Indiana Guard soldiers who served at Qarmat Ali "get something to compensate them their pain and suffering."

The moment the verdict was read, and the four soldiers in the courtroom learned that the jurors had found in their favor, they gasped and a few shed tears.

"I was more relieved than surprised," said Rocky Bixby, whose name is the first one listed on the lawsuit. "It was three years of frustration and anger and sadness coming out."

Another juror, Kevin Vassily, a vice president at Portland's Pacific Crest Securities, said the negligence finding came rather quickly. "It seemed fairly straightforward they they had botched it," he said. KBR officials didn't operate at Qarmat Ali the way a reasonable person with knowledge of the contaminant should have acted, he said.

"It was our belief that this was their mission," Vassily said. "They should have identified a potent issue and done something more about it."

While the soldiers are a long way from collecting any money, and other cases wait in the wings, somebody is glad that Roberta is spending his time back home and not in a courtroom -- his houseful of exotic, rescue birds.

The birds could be heard calling and chirping as Roberta spoke on the phone Monday. "They get upset when nobody's here," he said.

**--Mike Francis**

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[Oregon National Guardsmen's suit of Iraq War contractor goes to ...](#)  
www.therepublic.com/view/story/.../OR--Toxic-Legacy-of-War  
Oct 31, 2012 - KBR tried to warn the U.S. Army about the dangers of **sodium dichromate**. ... Seeking to head off Hussein, in late 2002 the army contracted KBR and ... had been using was **sodium dichromate**, a substance long restricted in the ...

[Oregon soldiers charge KBR with concealing critical document in ...](#)  
blog.oregonlive.com : Oregon at War : Veterans issues  
Apr 4, 2012 - KBR says the accusation is "just plain false." ... Oregon soldiers charge KBR with concealing critical document in **sodium dichromate** case ... general investigation directed them to the 2002 KBR assessment of the plant.

[Monday notes in the KBR case: Indiana Guard ... - OregonLive.com](#)  
blog.oregonlive.com : Oregon at War : Veterans issues  
Oct 15, 2012 - A dispatch from Monday morning proceedings in the KBR case ... colored-sand -> apparently the result of scattered **sodium dichromate**. ... questioning that he had been hospitalized for the effects of snorting cocaine in 2002.

[Monday notes in the KBR case: Indiana Guard officer testifies ...](#)  
itsonline.net/?p=3016  
Oct 16, 2012 - Lawyers for Oregon soldiers suing KBR Inc. sent an Indiana Guard ... that he had been hospitalized for the effects of snorting cocaine in 2002. ... on who KBR officials told about the presence of **sodium dichromate**, and when.

[from KBR's Response to "Plaintiffs' Motion to - Ms Sparky](#)  
mssparky.com/.../Bixby\_v\_KBR\_Response\_to\_Motion\_4-23-12.pdf  
File Format: PDF/Adobe Acrobat - Quick View  
Apr 23, 2012 - contract with KBR tapped the company in November 2002 to develop ... there was any **sodium dichromate** or exposure risk at Qarmat Ali, and it ...

[Toxic Profits: DPC Demands Answers On KBR's Sodium Dichromate ...](#)  
christyhardinsmith.firedoglake.com/.../toxic-profits-dp...  
Feb 11, 2009  
You'll recall that Halliburton subsidiary KBR was in charge of operations at a ... at the facility are all ...

More videos for KBR; Sodium Dichromate; 2002 »

[Soldiers' suit against war contractor goes to jury - The Register-Guard](#)  
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Nov 1, 2012 - KBR tried to warn the Army about the dangers of **sodium dichromate**. ... Seeking to head off Saddam, in late 2002 the army contracted KBR and ...

[Suing Soldiers Say Govt. Contractor Failed To Disclose Toxics ...](#)  
www.opb.org/.../suing-soldiers-say-govt-contractor-failed-d...  
by April Baer - More by April Baer  
Apr 4, 2012 - A group of soldiers suing the government contractor KBR have discovered a ... take KBR to task for failing to disclose an assessment performed in 2002. ... They say KBR knew 200 tons of **sodium dichromate** were present.

[US Soldiers Accuse KBR of Exposing Them to Sodium Dichromate ...](#)  
forums.anandtech.com : Social : Politics and News  
43 posts - 20 authors - Jun 22, 2008  
US Soldiers Accuse KBR of Exposing Them to **Sodium Dichromate** ... who may not even know of their exposure to **sodium dichromate** that ...

[Oregon National Guard « Overseas Civilian Contractors](#)  
civiliancontractors.wordpress.com/tag/oregon-national-guard/  
Apr 4, 2012 - **Sodium dichromate** is an anticorrosive compound that can cause skin ... investigation directed them to a 2002 KBR assessment of the plant.

Ad related to KBR; Sodium Dichromate; 2002

[Sodium dichromate](#)  
www.hszenhua.com/  
Used in tanning of leather, dyes, pigments, producing of chromic acid  
Sodium dichromate - Chromic acid - Chrome oxide green - Basic chrome sulfate

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